

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No. 03-47469

Will Henry Davis
and Barbara D Davis,

Chapter 13 Case

Debtors,

**OBJECTION BY PRIMUS AUTOMOTIVE FINANCIAL SERVICES, INC.
DBA MAZDA AMERICAN CREDIT
TO CONFIRMATION OF CHAPTER 13 PLAN
WITH MEMORANDUM**

TO: Debtors and other entities specified in Local Rule 9013-3.

1. PRIMUS Automotive Financial Services, Inc. DBA Mazda American Credit, (the "Respondent") is the holder of a claim in the above case, and, by its undersigned attorney, objects to confirmation of the proposed Chapter 13 Plan.
2. The petition commencing this Chapter 13 case was filed on October 24, 2003. Debtors' first Chapter 13 Plan was confirmed on December 8, 2003. The confirmed plan provided for Respondent's secured claim of \$5300.00 with 18% interest and total payments of \$6420.92. Debtors were to pay \$1190 per month to the Trustee beginning in November 2003.
3. On August 12, 2004, the Trustee filed a motion to dismiss for failure to make payments under the confirmed Chapter 13 Plan. In response to the motion to dismiss, Debtors filed a Postconfirmation Modified Chapter 13 Plan on August 17, 2004, which is scheduled for confirmation hearing on October 7, 2004 at 10:30 AM.
4. This objection arises under 11 U.S.C. §1324 and Fed. R. Bankr. P. 3015, and is filed under Fed. R. Bankr. P. 9014 and Local Rules 3015-3, 9013-2, 9013-3. Respondent objects to confirmation of the proposed Postconfirmation Modified Plan and requests an order denying confirmation of the proposed Plan.

5. Respondent is the holder of a claim, and is thus a party in interest.
6. The balance outstanding on the debt owed to Respondent by Debtors is \$14,574.94.
7. Respondent holds a perfected security interest in a 1999 Mazda 626 Sedan 4D ES vehicle (the collateral). Copies of the Lien Card or the UCC-1 Financing Statement and of Respondent's Contract evidencing the underlying transaction are attached to the claim filed with the court. The collateral is in the possession of the Debtors herein. Respondent's Contract provides for interest on the balance at the rate of 18.000 percent per year.
8. The Plan proposes that Debtors: (1) reduce their monthly plan payment to the Chapter 13 Trustee to be \$850.00 per month (2) keep possession of the collateral, (3) allow Respondent to retain its lien on the collateral, (4) pay Respondent on its claim through the Trustee payments, reducing the plan interest to 6% and reducing the total payments on the secured claim as well as reducing the total payments to Respondent's unsecured claim.
9. The Plan is objected to on the following grounds
 - a. Good Faith. That the Plan has not been proposed in good faith in violation of §1325(a)(3).

Under §1325(a)(3), the court cannot confirm a Chapter 13 plan that is not filed in good faith. In the 8th Circuit, good faith is determined by considering the totality of circumstances. In re LeMaire, 898 F.2d 1346 (8th Cir.1990). See also, In re Estus, 695 F.2d 311 (8th Cir.1982) and Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir.1987).

Three factors are considered in determining whether a plan was proposed in good faith: (1) whether the Debtor accurately stated his expenses and debts; (2) whether the Debtor made a fraudulent misrepresentation to the Bankruptcy Court; and (3) whether the Debtor unfairly manipulated the Bankruptcy Code. Bayer v. Hill, 210 B.R. 794, 796 (8th Cir. BAP August 12, 1997). Other factors may also be considered, such as: the nature of the debts sought to be discharged, including their dischargeability under Chapter 7, and the debtor's reasons for seeking Chapter 13 relief. See In re Reynold and Patricia Mattson, 241 B.R. 629 (Bkrcty. Minn. 1999) (No. 99-42865, Nov. 30, 1999). "The

bottom line for most courts, even those outside of this circuit, is whether the debtor is attempting to thwart his creditors or is making an honest attempt to repay them." Mattson, supra, page 637.

Debtors have voluntarily increased their mortgage payment through refinancing. Debtors assert the refinancing caused their disposable income to be reduced and now hope to have such post-petition behavior rewarded by having their other creditors accept reduced payments under the Chapter 13 Plan.

The burden is on the Chapter 13 Debtors to establish good faith in the filing of a debt adjustment plan once that good faith is questioned. In re Belt, 106 B.R. 553 (Bkrcty.N.D.Ind. 1989), §1325(a)(3).

- b. Feasibility. That the Plan is not feasible; the Debtors will not be able to make all payments nor comply with the Plan as required by §1325(a)(6).

§1325(a)(6) requires that the Debtors' proposed plan be feasible, that is, that the Debtors has sufficient income, assets or some source of funds to be able to complete the plan. The Debtors must be able to demonstrate the likelihood of being able to make any increased or balloon payments. Matter of Endicott, 157 B.R. 255 (W.D.Va.1993).

The Debtors must have sufficient current income to pay reasonable living expenses and still fund the plan as proposed. In re Wilkinson, 99 B.R. 366 (Bkrcty.N.D. Ohio 1989). Under-budgeting reasonable expenses in order to create the appearance of disposable income does not satisfy the feasibility requirement. In re Belden, 144 B.R. 1010 (Bkrcty.D. Minn.1992). The Debtors cannot include potential income which is too speculative in order to satisfy the requirement. In re Rose, 101 B.R. 934 (Bkrcty.S.D. Ohio 1989).

In this case, the Plan is not feasible. Debtors have already proven unable to make payments under the first confirmed plan. No change is foreseen in this financial disaster. Debtors have further increased their debt load post-petition. Therefore, the Plan is not confirmable.

- c. Not a Permitted Modification. Section 1329 establishes the permitted post-confirmation modifications that can be made in Chapter 13 cases.

Modifying a plan to reduce interest rates on secured claims and to "forgive" prior confirmed plan accumulated arrears is not included in the list of permissible modifications or reasons for modification. Furthermore, 11 U.S.C. Section 1327(a) states clearly the confirmed plan is binding on the debtor and

creditor. Debtors seek to undo the binding effects of confirmation. Respondent and the other creditors bound by the plan confirmation have been kept on hold without payments since June 2004. Debtors should be discouraged from such post-petition and post-confirmation conduct as provided in the Bankruptcy Code.

WHEREFORE, PRIMUS Automotive Financial Services, Inc. DBA Mazda American Credit requests the court deny confirmation of the proposed Postconfirmation Modified Plan.

Dated: September 29, 2004

STEWART, ZLIMEN & JUNGERS, LTD.

/e/ Linda Jeanne Jungers

Linda Jeanne Jungers, Atty ID #5303X

Attorneys for Movant

430 Oak Grove Street #200

Minneapolis, MN 55403

612-870-4100

This is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.

UNITED STATES BANKRUPTCY COURT
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UNSWORN DECLARATION OF PROOF OF SERVICE

I, Linda Jeanne Jungers, declare under penalty of perjury that on September 29, 2004, I mailed copies of the foregoing Objection to Confirmation of Plan with Memorandum, and proposed Order, and Unsworn Declaration of Proof of Service, by first class mail, postage prepaid, to each entity named below at the address stated below for each entity.

Will Henry Davis
6845 18th Ave S
Richfield, MN 55423

Barbara D Davis
6845 18th Ave S
Richfield, MN 55423

Craig Cook
Midwest Legal Counsel
1821 University Avenue #S217
St. Paul, MN 55104

Jasmine Z. Keller
Chapter 13 Trustee
12 S. 6th St #310
Minneapolis, MN 55402

U.S. Trustee
1015 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415

The Ramsey Law Firm, P.C.
Attn: Household Automotive Finance
Account: 500000576374
PO Box 201347
Arlington, TX 76006

James A Geske
for National City Bank
WILFORD & GESKE
7650 Currell Blvd, Suite 300
Woodbury, MN 55125

Executed on: September 29, 2004

Signed: /e/Linda Jeanne Jungers
Linda Jeanne Jungers
STEWART, ZLIMEN & JUNGERS
430 Oak Grove Street, #200
Minneapolis, MN 55403

04-03988-0

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

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Chapter 13 Case

Debtors,

ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

This Chapter 13 case came on before the Court on October 7, 2004 at 10:30 AM, for hearing on confirmation of a proposed Postconfirmation Modified Plan. Linda Jeanne Jungers appeared on behalf of PRIMUS Automotive Financial Services, Inc. DBA MazdaAmerican Credit. Other appearances were as noted in the record. Upon the record made at the hearing, and the other files, records, and proceedings in this case,

IT IS HEREBY ORDERED:

That confirmation of Debtor's Postconfirmation Modified Plan is denied.

Dated:

BY THE COURT:

United States Bankruptcy Judge